EMPLOYMENT TRIBUNALS

Claimant: **Mrs F Jobson**

Respondent: **London Borough of Hounslow**

JUDGMENT FOLLOWING A RECONSIDERATION

The respondent's application dated 4 August 2022 for reconsideration of the judgment sent to the parties on 2 August 2022 is refused

The claimant's application dated12 August 2022 for reconsideration of the same judgment is refused.

REASONS

Claimant's application

1. The claimant requests a reconsideration of the findings of fact made in paragraphs 61, 98 and 100. In particular, we had found that the claimant had given no evidence that the job to which she was transferred was worse in some way than being a locum social worker. In her grounds for reconsideration the claimant disputes this. It remains the case, however, that she did not provide any evidence that contradicts our finding at the relevant time. What she has said in her reconsideration application merely reiterates the evidence that she gave at the time and does not provide any factual evidence that would contradict our finding. The claimant is simply unhappy with the finding that we made but has not provided us with any grounds which would lead us to reconsider those findings.

2. The claimant has also raised the fact that she had asked for additional documentation from the respondent which she says was not provided. She states that the exclusion of these documents from the bundle placed her at a disadvantage. While we did note in our decision that the misalignment between document numbers and the bundle made it difficult for the parties, we did not make any finding that documents that were relevant had not been disclosed. The claimant had opportunities to raise this and to tell us at the time if these documents were relevant to her case. She did not do so. There comes a point at which the litigation must end and we do not find that the claimant has given us any compelling reason why we

should now ask for additional evidence to be provided and for the hearing to be reopened. Further, and more importantly, beyond a mere assertion that this is the case, there is nothing in her reconsideration application which suggests that these documents would in any event make any difference. The claimant is rehearsing matters already before us on which we have made a decision.

3. For all these reasons the application is therefore refused. There are no reasonable prospects of the original decision being varied or revoked.

The respondent's application

4. This is made on two grounds. Firstly they dispute our findings of fact made at paragraphs 38 and 99. We found that the claimant had given evidence that she thought of applying for the role but was discouraged from doing so by the comment made to her. We also found the claimant suffered a detriment because she felt unable to apply for the permanent role. In its reconsideration application the respondent states that the claimant had not argued that she was discouraged to apply from the role due to the statement made to her. It is also averred that this statement did not have the effect that we determined it did have.

5. The tribunal panel has rechecked its notes of evidence and are satisfied that it has accurately recorded the evidence that it was given. We are satisfied that the claimant did assert as her case that she was discouraged from applying for the role because of what was said to her.

6. We conclude that the respondent is disputing our factual findings but there is no basis on which to do so. On the first ground for the reconsideration the application is refused as there are no reasonable prospects of the original decision being varied or revoked.

7. The second ground is that the tribunal did not have proper regard for there to be a need for a causal connection between the claimant's pregnancy and the act of unfavourable treatment. The respondent suggests that any other member of staff expected to be absent, regardless of the underlying reason, would have received the same advice.

8. We were referred by the respondent to 2 authorities Johal v Commissioner for Equality and Human Rights UKEAT/541/09/DM and Indigo Design Build and Management v Martinez UKEAT/0020/14/DM.

9. We considered these and in particular noted paragraphs 29-31 of the latter which sets out this

> "The Tribunal was required by section 13(1) and sections 18(2) and thereafter to consider whether the alleged treatment of Mrs Martinez was "because of" the protected characteristic in question or "because of" pregnancy or maternity leave. The use of the term "because of" is a change from terms used in earlier discrimination legislation, but it is now well-established that no change of legal approach is required: see Onu v Akwiwu [2014] ICR 571 at paragraph 40, Underhill LJ. The law requires consideration of the "grounds" for the treatment.

> 30. Onu also contains a concise statement of the law concerning what will constitute the "grounds" for a directly discriminatory act. In that case the worker concerned had no proper immigration status. She was subjected to ill-treatment at work. Underhill J said: "42. What constitutes the 'grounds' for a directly discriminatory act will vary according to the type of case. The paradigm is perhaps the case where the discriminator applies a rule or criterion which is inherently based on the protected characteristic. In such a case the criterion itself, or its application, plainly constitutes the grounds of the act complained of, and there is no need to look further. But there are other cases which do not involve the application of any inherently discriminatory criterion and where the discriminatory grounds consist in the fact that the protected characteristic has operated on the discriminator's mind – what Lord Nicholls in Nagarajan called his 'mental processes' (p. 884 D-E) – so as to lead him to act in the way complained of. It does not have to be the only such factor: it is enough if it has had 'a significant influence'. Nor need it be conscious: a subconscious motivation, if proved, will suffice. Both the latter points are established in the speech of Lord Nicholls in Nagarajan: see pp. 885-6. 43. The distinction between the two kinds of case is most authoritatively made in the judgment of Lady Hale in R (E) v Governors of the JFS [2010] 2 AC 728, at paras. 61-64 (pp. 759-760), though it is to be found in the earlier case-law: I would venture to refer to my own judgment, sitting in the EAT, in Amnesty International v Ahmed [2009] ICR 1450, at paras. 32-35 (pp. 1469-70). 44. The present case is plainly not of the 'criterion' type. Mr Robottom in his skeleton argument contended otherwise, but the contention is, with all respect to him, unsustainable. The various acts of which Ms Onu complains – underpayment, being required to work excessive hours etc. – are not inherently based on her immigration status. If her immigration status was (part of) the grounds for those acts it is only because, in the mental processes which led to their doing them, Mr and Mrs Akwiwu were significantly influenced by it."
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> 31. It was not in dispute before me that this approach is appropriate in a direct discrimination claim under section 18 just as under section 13. I am sure that this is the case. There is, in fact, authority in the Employment Appeal Tribunal following this general approach: see Johal v Commissioner for Equality and Human Rights [2010] UKEAT/0541/09, HHJ Peter Clark

10. Where there is a finding that a rule or criterion which is inherently based on protected characteristic, is applied there is no need for more. Where the act does not involve the application of any inherently discriminatory criterion, then the mental processes of the decision maker are critical. The respondent in its reconsideration application suggests that the decision-maker was influenced by the absence but this had nothing to do with the underlying reason. Anyone absent for any reason would be treated the same way.

11. No evidence was given at the time that this was the case. Ms Fache Kabir's evidence was that she did not make the comment about the claimant being unlikely to be offered the role. She did not expand any further beyond her denial. She did not offer any suggestion as to what could have been on her mind as she denied any such comments. Any other motivation for the comment beyond the fact of the claimant's pregnancy and maternity leave, can only be a matter of speculation.

12. Our finding of facts, at paragraph 35, was that the claimant linked the possibility of her application and her maternity leave. We concluded that we preferred the evidence of the claimant to that of the line manager and found it more likely that the claimant had an accurate recollection of the conversation. The claimant's recall, which we accepted, was that she explained she was shortly going to be on maternity leave and the response was she was unlikely to get the role if another candidate was able to work.

13. We agree that the claimant's evidence is that the comment was made because of expected absence, but it was not disputed that the absence in question was maternity absence. Maternity absence is inextricably linked to pregnancy. In the context in which that comment was made we are satisfied that there was a causal connection between the reason for the absence itself and the comment. We accepted that this is how the claimant had received the comment and there was no evidence to the contrary from the respondent. There was no evidence that any absence would have generated this response.

14. We have concluded that this is a case where the reason why the claimant was subjected to particular treatment was because of her pregnancy and therefore the causation test has been applied.

15. The application for reconsideration on the second ground is therefore refused as there are no reasonable prospects of the original decision being varied or revoked.

Employment Judge McLaren
Date: 12 September 2022